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Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

STEPHANIE PEETE, PETITIONER

*v.*

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; NASHVILLE TENNESSEE FIRE DEPARTMENT and MICHAEL TURNER, Firefighter Captain; MALCOLM ARRINGTON, Firefighter; WILLIAM KEVIN WEST, Paramedic; DAVID KINGSBURY, Paramedic; LLOYD CRAWFORD, EMT

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is an epileptic who is hog-tied in a prone position on his stomach and then asphyxiated by emergency medical personnel when they applied continuous pressure to his head, back, neck, shoulders and torso "seized" under the Fourth Amendment or must it first be shown that he was conscious and communicated his lack of consent to this procedure before a constitutional deprivation can be found?

2. Are paramedics absolutely immune from liability under 42 U.S.C. § 1983, for injuring or killing a citizen when acting maliciously, willfully, wantonly or with deliberate indifference to the citizen's well being simply because they are emergency rescue personnel responding to a citizen's "911" call for help?

3. Was the petitioner denied a fair hearing on his claims when in deciding this Rule 12(b)(6) motion to dismiss, the court of appeals impermissibly found facts at odds with the petitioner's complaint, unfounded facts which it relied upon to rule that the petitioner's complaint did not state a claim upon which relief could be granted?

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## OPINIONS BELOW

The published opinion and judgment of the United States Court of Appeals for the Sixth Circuit in *Stephanie Peete v. Metropolitan Government of Nashville et al.*(C.A. No. 06-5321), decided May 22, 2007, and reported at 486 F.3d 217(6th Cir. 2007), reversing the District Court's refusal to grant a qualified immunity to the paramedic respondents in this civil rights action for damages, is set forth in the Appendix hereto(App. 1-14).

The unpublished Memorandum Order of the United States District Court for the Middle District of Tennessee, Nashville Division, in *Stephanie Peete v. Metropolitan Government of Nashville et al.*(Civil Action No. 3:05-0552), decided February 6, 2006, denying the respondent paramedics' motion to dismiss the petitioner's complaint on the basis of their qualified immunity from suit for damages under 42 U.S.C. § 1983(App. 15-18).

The unpublished order of the United States Court of Appeals for the Sixth Circuit in *Stephanie Peete v. Metropolitan Government of Nashville et al.*(C.A. No. 06-5321), filed on November 23, 2007, denying the petitioner Stephanie Peete's timely filed petition for rehearing *en banc* is set forth in the Appendix hereto(App. 18-22).

The petitioner's complaint seeking damages under 42 U.S.C. § 1983 *et seq.* against the respondents and invoking the District Court's jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1367, is set forth in the Appendix hereto(App. 23-39).

## JURISDICTION

The decision of the Sixth Circuit Court of Appeals reversing the District Court's refusal to grant a qualified immunity to the paramedic respondents in this civil rights action for damages was entered on May 22, 2007; and its order denying the petitioner Stephanie Peete's timely filed petition for rehearing *en banc* was filed on November 23, 2007(App. 1;18-22). This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the petitioner Stephanie Peete's timely filed petition for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS INVOLVED

**United States Constitution, Amendment IV:**

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**United States Constitution, Amendment V:**

> No person shall...be deprived of life, liberty, or property, without due process of law....

**United States Constitution, Amendment VIII:**

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**United States Constitution, Amendment XIV, Section 1:**

> ..No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**28 U.S.C. § 1343(a)(4):**

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> ...
> (3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

**Civil Rights Act–42 U.S.C. § 1983:**

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

**Civil Rights Act–42 U.S.C. § 1986:**

> Every person who, having knowledge that any of the wrongs conspired to be done..., are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented....

**Fed. R. Civ. P. 12(b)(6):**

> ...[T]he following defenses may at the option of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted....

## STATEMENT

On Thursday, July 15, 2004, at approximately 9:00 P.M., Ms. Alma Tunstill of Madison Tennessee, the grandmother of the decedent Federico Becerra, Jr. ("the decedent"), telephoned "911" in order to summon the emergency rescue personnel for the metropolitan government of Nashville and Davidson County to the family's home at 809 Cheyenne Boulevard(App. 23-25). The decedent was experiencing a seizure due to his

epilepsy, had fallen in the home's kitchen next to the refrigerator and Ms. Tunstill was unable to lift her grandson to his feet(App. 25).

The respondents Michael Turner, Malcolm Arrington, William Kevin West, David Kingsbury and Lloyd Crawford, all firefighters and/or paramedics and/or emergency medical technicians for the metropolitan government of Nashville and Davidson County ("the respondents") arrived at Ms. Tunstill's home in response to her "911" call; and she told all the respondents that the decedent suffered from epilepsy and was having a seizure(App. 24-25).

The respondents proceeded to drag the decedent from the kitchen to the living room area and immediately place him in a prone position(App. 25). They then "began to restrain the decedent by using their bodies to apply weight and pressure to the decedent's head, neck, shoulders, arms, torso and legs in an attempt to prevent the decedent from moving"(App. 25). In addition, the respondents tied the decedent's hands and ankles behind his back(App. 25). Even though at no time prior to his restraint did the decedent present a threat to himself or to the respondents, the respondents continued to apply pressure to the decedent while he was in this prone position on his stomach(App. 25-26).

Throughout this entire episode, the respondents failed to assess whether the decedent was in need of medical treatment(App. 26). Nor did any of the respondents take any action to monitor his condition, to ensure that the decedent was breathing during the time that they restrained him, or to make sure that he

had a clear air passage to breathe during this episode(App. 26). Shortly after the decedent was restrained by the respondents in this manner in his home, he died(App. 26).

The decedent had not committed any crime before or after the respondents arrived at the Tunstill home as the result of the "911" call (App. 26). Nor did the respondents have probable cause or reasonable cause to believe that the decedent had committed or was about to commit a crime(App. 26). Yet "at no time after the [respondents] placed their hands upon the...decedent was he free to move about the house, free to leave the living room, free to seek medical attention elsewhere or free to leave the grasp of the [respondents]"(App. 26).

Upon these operative facts, the petitioner Stephanie Peete, the decedent's sister and personal representative ("the petitioner"), brought this civil action on July 13, 2005, against the respondents in the United States District Court for the Middle District of Tennessee(App. 23-39). Alleging all of the facts described above and invoking the jurisdiction of the federal court pursuant to 28 U.S.C. §§ 1331, 1343(a) and 1367, the petitioner alleged that during all relevant times described in the complaint, the respondents were acting within the scope of their employment for the metropolitan government of Nashville and Davidson County and were therefore conducting themselves under color of state law(App. 24-25).

The petitioner then alleged that her brother died as the direct result of the pressure the respondents applied to his head, back, shoulders, neck and torso

while he was placed on his stomach with his hands and legs tied behind his back; the manner by which the respondents restrained him; their failure to monitor his breathing and alleviate his being denied the ability to breathe while he was being restrained; their failure to provide the decedent with appropriate emergency medical care at the scene; their failure to provide him with proper medical care before "his body arriv[ed] at the hospital;" their failure to diagnose and treat the decedent's behavior as an epileptic seizure; and their failure to follow their own procedures and protocols for caring for a person suffering from an epileptic seizure(App. 27).

As the petitioner alleged, the respondents "knew or should have known that their activities created a strong likelihood of death or great bodily harm"(App. 26). In this regard, the petitioner alleged that "[a]ll of the [respondents] acted maliciously, willfully, wantonly, in reckless disregard for and/or with deliberate indifference to" the decedent's safety, life, medical needs and constitutional rights(App. 27). As a result, the decedent "suffered extreme physical and emotional trauma, pain, injury, suffering, and humiliation"(App. 27).

In Count I of her complaint seeking damages under 42 U.S.C. § 1983, the petitioner described the respondents' conduct toward the decedent as "an excessive use of force," constituting an unreasonable seizure which deprived him of the right to life guaranteed him by the Fourth and Fourteenth amendments to the constitution(App. 27-28). Count II recounted the respondents' failure to provide the decedent with timely and proper medical attention by

> restraining him, restraining him in a prone position for a prolonged period of time, compromising his airway, not sitting him up or turning him on his side, not removing his hand and leg restraints, not clearing his airway, not providing cardiovascular resuscitation, failing to follow proper and established protocols under the circumstances, and/or not providing for, or seeking, proper advice and/or appropriate emergency assistance to do any of the above.

(App. 29-30). All of this, the petitioner alleged, deprived the decedent of his right to be free from an unlawful seizure, excessive force, and his right to life as guaranteed him by the constitution(App. 29-30).

Count III sought damages on account of the conspiracy among the respondents to deprive the decedent of his constitutional rights as well as to deprive his parents of their rights of consortium with him(App. 31-32). A fourth count sought damages under 42 U.S.C. §§ 1983 and 1986, for the respondents' failure to protect the decedent from being deprived of his civil rights(App. 32-33).

Two following counts sought damages against the Metropolitan Governments of Nashville and Davidson County for failing to train, counsel, and control its firefighters, paramedics and EMTs in the excessive use of force and other abuses, including the care and treatment of epileptic patients who are undergoing seizures(App. 34-36). Finally, in Count VII, the petitioner articulated a wrongful death claim against the respondents under Tennessee state law (App. 38-39).

The individual respondents moved to dismiss the first four counts of the petitioner's complaint under Fed. R. Civ. P. 12(b)(6) contending that as firefighters, paramedics or EMTs responding to a medical emergency, they were protected by a qualified immunity for their actions described in the complaint(App. 15).

On February 6, 2006, the District Court, Haynes, William J., J., denied the respondents' motions to dismiss these four counts(App. 15-17). Treating all of the well-pleaded allegations of the petitioner's complaint as true and noting the heightened scrutiny which attends motions to dismiss civil rights actions such as this, the District Judge determined that the first four counts of the petitioner's complaint will survive a motion to dismiss:

> Here, [the petitioner] alleges that during the deceased epileptic episode, the individual [respondents] used excessive force with their bodies to preclude him from moving when he needed medical attention. Freedom from excessive use of force is a Fourth Amendment right that was clearly established at the time of the individual [respondent's] alleged conduct. *Graham v. Connor*, 490 U.S. 386, 396-397(1989). The use of the alleged force in this factual context has been held to be excessive force and sufficient to deny qualified immunity. *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2005) (denying qualified immunity for similar acts in 2000). Whether the actual facts show a violation of those rights requires discovery.

(App. 16-17).

The respondents appealed and on May 22, 2007, the court of appeals for the Sixth Circuit unanimously reversed the District Court's refusal to dismiss the first four counts of the petitioner's complaint in a published opinion. *Stephanie Peete v. Metropolitan Government of Nashville et al.*, 486 F.3d 217(6th Cir. 2007)(App. 3-14).

It first determined that it could find no decisional authority finding that a "seizure" under the Fourth Amendment takes place when paramedics restrain a person when answering a "911" call for medical aid(App. 5;7). In so holding, the court of appeals, contrary to Rule 12(b)(6) procedure, *five times* changed the facts alleged in the petitioner's complaint to make the decedent at all relevant times before his death "neither communicative nor conscious"(App. 7-11;13). It then held that a "seizure" of the person under the Fourth Amendment for purposes of a Section 1983 suit for damages can only occur when that person is conscious and therefore "consciously" submits to a show of governmental authority(App. 7-8). Since the court of appeals concluded from the face of the complaint that the decedent was not conscious at any time during his epileptic seizure, he could not, according to the court, perceive any restraint on his own liberty or "otherwise feel compelled to submit to a governmental show of force," thereby undermining his constitutional claim that he had been "seized" within the meaning of the Fourth Amendment for the purposes of this civil rights suit for damages(App. 8).

Moreover, the court of appeals categorically denied the existence of any jurisprudence which

creates a constitutional liability for the negligence, deliberate indifference or incompetence of rescue personnel who are solicited by a family member to render aid in an emergency(App. 5;8-9). Instead, constitutional liability for such misconduct is invoked only where the governmental person is seeking "to enforce the law, punish, deter, or incarcerate"(App. 8). As it concluded,

> where the purpose is to render solicited aid in an emergency rather than to enforce the law, punish, deter, or incarcerate, there is no federal case authority creating a constitutional liability for the negligence, deliberate indifference, and incompetence alleged in the instant case....
> ....The paramedics did not unreasonably seize [the decedent] for the purpose of interfering with his liberty. They responded to [the decedent's] grandmother's call that he was experiencing an epileptic seizure and needed medical attention. *They were not acting to enforce the law, deter or incarcerate*....[T]he paramedics acted in order to provide medical aid to [the decedent]. They were attempting to help him, although they badly botched the job according to the complaint.

(App. 10-11). It therefore reversed the ruling below and remanded the case with instructions to grant a qualified immunity to the individual respondents(App. 14).

On November 23, 2007, the court of appeals denied the petitioner's timely petition for rehearing *en banc*(App. 18-22). In issuing this denial, the court of appeals rejected the idea that its decision created

*absolute* immunity from liability under 42 U.S.C. § 1983, for paramedics, firefighters and EMTs when responding to a "911"emergency call even when, as alleged here, they were acting maliciously, willfully, wantonly, or with deliberate indifference the citizen's well being(App. 19-20).

In addition, the court of appeals minimized its reliance on its prior conclusion that the decedent was at all times unconscious during his interaction with the emergency medical personnel; instead it claimed that its decision about a "seizure" not taking place within the meaning of the Fourth Amendment was bottomed on "the operative fact" that the decedent never "expressed a lack of consent to the paramedics' actions"(App. 20). The court then without any basis for doing so extrapolated from language in the petitioner's complaint the crucial fact that the decedent had never expressed a lack of consent to the paramedics' actions, rejecting any suggestion by the petitioner that she could adduce proof that the decedent "was in fact alert during this period and expressed a desire for the paramedics to release their grip on him"(App. 21).

## REASONS FOR GRANTING THE PETITION

**1. The Decision Below Undermines The Jurisprudence of This Court That *Any* State Actor—Including Emergency Medical Personnel---Who Restrains A Person In the Midst of An Epileptic Seizure By Hog-Tying Him, By Keeping Him In A Prone Position On His Stomach And Then By Applying Continuous Pressure To His Head, Neck, Shoulders, Back and Torso Until He Dies of Asphyxiation "Seizes" That Person Within The Meaning Of The Fourth Amendment And Is Liable For Damages Under 42 U.S.C. § 1983, Regardless of Whether That Person Communicates His Lack of Consent To the Procedure.**

The petitioner's complaint alleges that the decedent died as the result of the respondents' excessive use of force. After dragging the decedent from the kitchen floor of the Tunstill home into its living room, they bound both his wrists and ankles behind his back ("a hog tie"), placed him on his stomach in a prone position on the floor and then applied continuous pressure to his head, neck, shoulders, back and torso until he died by asphyxiation. In addition, the complaint alleged that during this episode, the decedent was *not* free to leave the grasp of the respondents, to move about the house or to seek medical treatment elsewhere. As the petitioner alleged, the respondents' actions violated the decedent's constitutional rights by restraining him with such force and in such a manner that it caused his death.

Before, during and after this episode---even after the decedent had died by asphyxiation---it was alleged

that the respondents failed to provide the decedent with necessary medical care or treatment; and the petitioner never claimed in her complaint that the respondents' excessive restraint and use of force upon the decedent was employed in order to provide him with medical care or treatment. Moreover, nowhere in the complaint does the petitioner allege that the decedent was unconscious at any time before his death. In fact, the most reasonable inference from reading the complaint is that *the decedent was conscious at all times until he suffocated and died.*

For example, the petitioner alleges in paragraph 10 of her complaint that upon bringing the decedent into the living room, the respondents "began to restrain the decedent by using their bodies to apply weight and pressure to the decedent's head, neck, shoulders, arms, torso and legs *in an attempt to prevent the decedent from moving*"(App. 25)(emphasis supplied). This allegation, taken as true, undermines any notion that the decedent was unconscious during this episode for if the decedent were unconscious, as the court of appeals surmised, there would be no need for the respondents to restrain him from moving.

To the same effect is paragraph 18 of the complaint(App. 26). There it is alleged that once the respondents arrived at the Tunstill home, the decedent was *not* free to leave their grasp, to move about the house or to seek medical treatment elsewhere(*Id.*). This allegation bespeaks consciousness on the decedent's part, *not* unconsciousness. Moreover, paragraphs 24 and 28 of the complaint allege that as the result of the respondents' conduct, the decedent suffered "physical and psychological injuries, pain, humiliation, and

suffering, from the time the [respondents] restrained him until his death"(App. 28;30). This, too, implies consciousness on the decedent's part—*not* unconsciousness---throughout his entire encounter with the respondents and until his death by asphyxiation.

Thus taken as true for the purposes of the respondents' motion to dismiss under Fed. R. Civ. P. 12(b)(6), these allegations were sufficient to state a claim against the respondents for damages under 42 U.S.C. § 1983, as a result of the excessive force they employed against the decedent.

*A. The Allegations of A "Seizure" Were Sufficient To State A Claim And This Court's Decisions Make Irrelevant The Consciousness Or Consent of the Person Whose Movement Is Restricted.*

First, the petitioner's allegations sufficiently allege a "seizure" under the Fourth Amendment, enough to describe a deprivation of the decedent's constitutional rights for purposes of Section 1983. "[A] Fourth Amendment seizure [occurs]...when there is a governmental termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo*, 489 U.S. 593, 596-597;599(1989). *United States v. Jacobsen*, 466 U.S. 109, 113 n.5(1984). *Terry v. Ohio*, 392 U.S. 1, 19(1968). It is a governmentally-caused acquisition of physical control; it means the laying on of hands or the application of physical force by a governmental actor(s) to restrain the movement of an individual, even when it is ultimately unsuccessful. *California v. Hodari D.*, 499 U.S. 621, 626 (1991). *Hill v. California*, 401 U.S. 797, 802-805(1971).

A person has accordingly been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, "a reasonable person would have believed that he was not free to leave." *California v. Hodari D.*, 499 U.S. at 627-628 quoting *United States v. Mendenhall*, 446 U.S. 544, 554(1980). The *Mendenhall* Court therefore establishes that the test for the existence of a "show of [governmental] authority" sufficient for showing a "seizure"

> is an objective one: *not* whether the citizen perceived that he was being ordered to restrict his movement, but whether the [governmental actor's] words and actions would have conveyed that *to a reasonable person.*

499 U.S. at 628(emphasis supplied).

Thus the test in *Hodari D.* and *Mendenhall* for determining whether the "seizure" of a person occurs under the Fourth Amendment does *not* depend upon the consciousness of the person seized or whether he communicates his lack of consent to that seizure. Instead, it hinges on whether the actions and words of the governmental actor would have conveyed *to a reasonable person* that he was not free to move. *Id.* In this sense, the objective test of "seizure' established by this Court in both *Hodari D.* and *Mendenhall* makes irrelevant the consciousness or consent of the person whose movement is actually restricted. Instead, its is the state actor's actions and words which determine whether a "seizure" occurs and the allegations here clearly meet that standard.

For this reason, the allegations of the petitioner's complaint demonstrated a "seizure" of the decedent under the Fourth Amendment. The court of appeals' unsubstantiated surmise that the decedent, despite undergoing an epileptic seizure, was unconscious or did not communicate his lack of consent to his restraint by the respondents and was therefore never "seized" within the meaning of the Fourth Amendment is at odds with this Court's decisions in *Hodari D.* and *Mendenhall,* setting forth an objective standard, and cannot be justified under any reading of the petitioner's complaint.

*B. The Fourth Amendment Applies to The Actions of Firefighters, Paramedics and EMTs.*

Second, as this Court made clear in *Graham v. Connor*, 490 U.S. 386, 394-395 & n.10 (1989), the Fourth Amendment's protection against the unreasonable seizure of a person is aimed principally at "physically abusive governmental conduct" by governmental actors. *Id.* citing *Brower*, 489 U.S. at 596; *Terry*, 392 U.S. at 19 n.16. Thus the Fourth Amendment applies to paramedics, EMTs and firefighters when they conduct themselves in their professional governmental capacity, as here. See *Jackson v. Schultz*, 429 F.3d 586, 590-591(6th Cir. 2005); *Doe v. Heck*, 327 F.3d 492, 509(7th Cir. 2003)(the Fourth Amendment requirements apply to child welfare workers as well as other governmental workers). See also *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189, 199-200(1989)("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on

his own behalf").

Accordingly, based on the allegations of the petitioner's complaint, all of the actions of the respondents in the course of their interaction with the decedent as emergency medical personnel on July 15, 2004, are measured against the reasonableness standard of the Fourth Amendment.

*C. This Court Has Never Endowed Emergency Medical Personnel With Absolute Immunity From Liability Under 42 U.S.C. § 1983, For Injuring Or Killing A Citizen In The Course of Their Employment Simply Because They Are Responding To A Citizen's "911" Call For Help, Especially When They Act Maliciously, Willfully, Wantonly Or With Deliberate Indifference To A Citizen's Well Being, As Alleged By the Petitioner.*

The court of appeals ruled that the emergency medical personnel were absolutely immune from liability for damages under 42 U.S.C. § 1983, because they were not acting to enforce the law, to deter or to incarcerate but rather only to provide medical aid to someone who had called "911" for help. This is *not* the test for liability under § 1983, as outlined by this Court, and the respondents should have been held to answer for the injuries and ultimate death which the decedent sustained as the result of their malicious, willful, wanton, or deliberately indifferent conduct, actions which included hog-tying the decedent in the midst of an epileptic seizure, keeping him in a prone position on his stomach and then applying continuous pressure on his head, neck, shoulders, back, legs and torso until he died of asphyxiation.

As this Court has repeatedly held, the standard of liability for this constitutional deprivation remains an objective one, *not* a subjective one. That is, an action challenged as the use of excessive force is "reasonable" under the Fourth Amendment, *regardless of the individual state actor's state of mind*, as long as the circumstances viewed objectively, justify the action taken. *Brigham City, Utah v. Stuart*, ___U.S.___, ___; 126 S.Ct. 1943, 1948(2006). *Graham v. Connor*, 490 U.S. at 397. *Terry v. Ohio*, 392 U.S. at 21-22("good faith on the part of the arresting officer is not enough..."). *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904-905(6th Cir. 2004)("We recognize that the Officers perhaps did not intend to harm [the decedent], indeed they may have believed they were helping him. Such a consideration is immaterial, however, because the qualified immunity doctrine is an objective one; motive is irrelevant.").

Stated another way, the fact that the respondents were answering the "911" call of Alma Tunstill, the decedent's grandmother, and were in the process of providing assistance to the decedent when he died as the result of their excessive restraint is irrelevant to liability under § 1983. The material question is whether the respondents' actions were "objectively reasonable" in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation. Graham v. Connor, supra* citing *Scott v. United States*, 436 U.S. 128, 137-139(1978). *Accord, Indianapolis v. Edmond*, 531 U.S. 32, 44(2000); *Bond v. United States*, 529 U.S. 334, 338 n.2(2000); *Whren v. United States*, 517 U.S. 806, 813(1996).

Thus the fact that the respondents were not acting to enforce the law, to deter or to incarcerate but rather were in the Tunstill home only to provide medical aid to someone who had called "911" for help does not clothe the respondents with absolute liability for the decedent's death and it was wrong for the court of appeals to rule otherwise. Instead, the court of appeals should have read the petitioner's complaint with all deference to the petitioner in order to assess whether the circumstances described therein showed that regardless of the respondents' motivation their seizure of the decedent was objectively unreasonable.

When read with such deference to the petitioner, her complaint alleges a deprivation of a constitutional right, one which was clearly established at the time of the deprivation in that no reasonable firefighter, paramedic or EMT could have thought that first hog-tying the decedent in the midst of his epileptic seizure, placing him prone on the floor on his stomach and then applying continuous pressure to his head, neck, shoulders, back, legs and torso until he died of asphyxiation was reasonable in the circumstances, especially where there is no allegation in the petitioner's complaint that the decedent presented any threat to himself or to anyone else. See *Saucier v. Katz*, 533 U.S. 194, 201-202(2001); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056-1062(9th Cir. 2002); *Deorle v. Rutherford*, 272 F.3d 1272, 1278-1279;1285-1286(9th Cir. 2001).

The court of appeals' failure to conduct this inquiry has inappropriately created a new exception to liability from suit under 42 U.S.C. § 1983, for paramedics, firefighters and emergency medical

personnel when responding to a "911" emergency, i.e., that they are now *absolutely* immune from liability for injuring or killing a citizen when answering a "911" call for help even when it is alleged that they acted maliciously, willfully, wantonly or with deliberate indifference to a citizen's well being. Moreover, this immunity may well extend to *any* emergency response personnel, including the police. This result is fundamentally at odds with the decisions of this Court, with constitutional law and with the rights of those citizens who suffer grievous loss at the hands of emergency response personnel, however motivated.

**2. The Court of Appeals Impermissibly Distorted The Protocol Which Attends The Resolution of A Motion To Dismiss Under Fed. R. Civ. P. 12(b)(6) By Finding Facts At Odds With The Petitioner's Complaint, Unfounded Facts Which It Relied Upon To Conclude that the Petitioner's Complaint Failed To State A Claim Upon Which Relief Could Be Granted.**

For the purpose of the respondents' motion to dismiss the petitioner's complaint under Rule 12(b)(6) for failure to state a claim upon which relief may be granted, the complaint is to be construed in the light most favorable to the petitioner and its allegations are taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236-237(1974). *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515-516(1972). See also *Conley v. Gibson*, 355 U.S. 41, 45-46(1957).

The generous standard of review to be applied to determine the sufficiency of the petitioner's complaint was set out in the leading case of *Conley v. Gibson*,

*supra*, where the Court observed that

> in appraising the sufficiency of the complaint we follow...the accepted rule that a complaint should not be dismissedfor failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

355 U.S. at 45-46. *Accord, Scott v. Harris*, ___U.S.___, 127 S.Ct. 1769, 1774-1775(2007); *Brower*, 489 U.S. at 598-599(1989); *Champion*, 380 F.3d at 904-905.

Instead of reading the petitioner's complaint with this required deference, the court of appeals impermissibly *added facts* to the petitioner's complaint, crucial facts which it relied upon in order to conclude that the complaint did not state a claim upon which relief could be granted. For example, the lower court found without reason that the decedent was unconscious throughout his encounter with the respondents; that he never communicated his intent to be free of their restraint; that the decedent's grandmother acquiesced in the respondents' wanton, illegal and abusive conduct; that the respondents' conduct once in the home was merely a "botched job;" that they were acting in good faith throughout this encounter; and that they actually rendered medical aid to the decedent during the encounter.

All of these "facts" have no foundation, improperly sanitize the respondents' illegal, unconstitutional conduct at every turn and undermine this Court's longstanding principles of protocol for the resolution of a motion to dismiss under Rule 12(b)(6).

This distortion of federal practice invokes this Court's powers of superintendency over the federal system and warrants a restatement by this Court which addresses the limited, deferential role of courts when ruling upon a motion to dismiss.

## CONCLUSION

For all of the reasons stated herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals, remanding the matter to the district court for further discovery and a trial on the merits of the petitioner's claims; or to provide her with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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Filed 5/22/2007

No. 06-5321
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHANIE PEETE,
Plaintiff-Appellee,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; NASHVILLE TENNESSEE FIRE DEPARTMENT, Defendants, MICHAEL TURNER, Firefighter Captain; MALCOLM ARRINGTON, Firefighter; WILLIAM KEVIN WEST, Paramedic; DAVID KINGSBURY, Paramedic; LLOYD CRAWFORD, EMT, Defendants-Appellants.

JUDGMENT

JUDGES: Before: MERRITT and GRIFFIN, Circuit Judges; LAWSON, District Judge

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEROF, it is ORDERED that the judgment of the district court is REVERSED

and the case is REMANDED with instructions to grant qualified immunity to the individual defendants and for other relief not inconsistent with the opinion of this court.

No. 06-5321

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHANIE PEETE,
Plaintiff-Appellee,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; NASHVILLE TENNESSEE FIRE DEPARTMENT, Defendants, MICHAEL TURNER, Firefighter Captain; MALCOLM ARRINGTON, Firefighter; WILLIAM KEVIN WEST, Paramedic; DAVID KINGSBURY, Paramedic; LLOYD CRAWFORD, EMT, Defendants-Appellants.

April 17, 2007, Argued
May 22, 2007, Decided
May 22, 2007, Filed

PRIOR HISTORY:

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 05-00552—William J. Haynes, Jr., District Judge.

COUNSEL: ARGUED: Allison L. Bussell, METROPOLITAN DEPARTMENT OF LAW, Nashville, Tennessee, for Appellants.

Dennis J. DeCaro, KUPETS & DECARO, Chicago, Illinois, for Appellee.

ON BRIEF: Allison L. Bussell, Lora Barkenbus Fox, Jennifer L. Bozeman, METROPOLITAN DEPARTMENT OF LAW, Nashville, Tennessee, for Appellants.

Dennis J. DeCaro, KUPETS & DECARO, Chicago, Illinois, Culwell Edwards Ward, WARD, DERRYBERRY & THOMPSON, Nashville, Tennessee, for Appellee.

JUDGES: Before: MERRITT and GRIFFIN, Circuit Judges; LAWSON, District Judge. *

OPINION BY: MERRITT

OPINION

MERRITT, Circuit Judge. In this wrongful death action, five individual defendants were sued in their individual capacities -- all of whom were firefighters, paramedics and emergency medical technicians employed by the Metropolitan Government of Nashville, Tennessee -- and they now appeal the district court's order denying their motion to dismiss [*2] the plaintiff's § 1983 complaint on the basis of "qualified immunity." We review the order on the pleadings *de novo*. The plaintiff, who is decedent's next of kin, alleges that the defendants violated decedent Frederico Becerra, Jr.'s Fourth Amendment rights in the course of administering requested medical aid during an ongoing epileptic seizure. Specifically, the plaintiff claims that defendants, who were answering a 911 call, used excessive force in restraining Becerra and refused him appropriate medical attention when he was in an unconscious epileptic state. Becerra had,

according to the complaint, "fallen next to the home's refrigerator" where his "grandmother was unable to lift her grandson to his feet."

We find no case authority holding that paramedics answering a 911 emergency request for help engage in a Fourth Amendment "seizure" of the person when restraining the person while trying to render aid. Hence there is no "clearly established law" creating federal liability for a constitutional tort under these circumstances. The district court, therefore, erred in failing to grant qualified immunity to the paramedics.

We analyze claims of qualified immunity in these circumstances [*3] using a three-prong test:

> First, we determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiff show that a constitutional violation has occurred.
>
> Second, we consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known.
>
> Third, we determined whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.*Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003). The plaintiff's case fails under all three of these prongs.

I. Facts As Alleged in Complaint

On July 15, 2004, at approximately 9:00 p.m., decedent Becerra's grandmother called 911 requesting medical attention for Becerra, who she reported was experiencing an epileptic seizure. The defendants responded to the call and briefly discussed Becerra's history of epilepsy with his grandmother. They then restrained Becerra "by using their bodies to apply weight and pressure to [Becerra's] head, neck, shoulders, arms, torso and legs in an attempt [*4] to prevent the decedent from moving." J.A. 10. In a further effort to restrain Becerra and protect themselves, they tied his hands and ankles behind his back and continued to apply pressure to Becerra while he was in a prone position. Defendants did not take any precautions to ensure that Becerra had a clear passage to breathe, and shortly after being restrained in this matter, Becerra died. There is no claim that defendants, or any of them, acted purposely to harm Becerra, but the claim is that they acted negligently or with "deliberate indifference."

The plaintiff, Becerra's personal representative, has brought a seven-count complaint alleging that defendants violated Becerra's Fourth and Fourteenth Amendment rights. Four of these counts are now before us: (1) exercising excessive force; (2) failing to provide medical attention; (3) conspiring to deprive Becerra of his Constitutional rights; and (4) failing to protect Becerra from the other emergency actions. The defendants filed a Rule 12(b)(6) motion to dismiss the claims on the grounds that the plaintiff had failed to state a claim and alternatively, that they were entitled to qualified immunity. In a brief order, the [*5] District Court denied defendant's motions to dismiss holding that the plaintiff had stated a viable claim and

that the defendants are not entitled to qualified immunity because the rights at issue "are clearly established." J.A. 23-24. We do not agree.

II. Qualified Immunity

In the vast majority of these Fourth Amendment cases, courts analyze the conduct of police officers toward persons they have arrested or otherwise detained, but courts have held that the protection extends to actions by other government officials. *E.g.*, *Michigan v. Tyler*, 436 U.S. 499, 506, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978) (holding that the Fourth Amendment applied to firefighters investigating the cause of a fire); *Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003) (applying the Fourth Amendment to a child welfare caseworker who, accompanied by a police officer, removed a child from class to question him about circumstances in his home). But there are no cases applying the Fourth Amendment to paramedics coming to the aid of an unconscious individual as a result of a 911 call by a family member. The result must turn on the specific purpose and the particular nature of the conduct [*6] alleged in the complaint. The question whether a seizure has occurred within the meaning of the Fourth Amendment is an objective one. *Brigham City, Utah v. Stuart*, 126 S. Ct. 1943, 1948, 164 L. Ed. 2d 650 (2006). The various definitions of "seizure" contained in the precedents connote an intentional interference with a person's liberty by physical force or a show of authority that would cause a reasonable person consciously to submit. *See Scott v. Harris*, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007) (holding that "a Fourth Amendment seizure [occurs] . . . when there is a governmental termination of freedom of movement through means

intentionally applied") (citing *Brower v. County of Inyo*, 489 U.S. 593, 596-597, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989)); *United States v. Jacobsen*, 466 U.S. 109, 114 n.5, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) (referencing the Court's "oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth Amendment -- meaningful interference, however brief, with an individual's freedom of movement"); *Bennett v. City of Eastpointe*, 410 F.3d 810, 833 (6th Cir. 2005) ("This rationale comports with *California v. Hodari D.*, 499 U.S. 621, 626, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), [*7] which held that a Fourth Amendment seizure occurs when there is (1) a show of authority, and (2) submission to a show of authority."); *United States v. Richardson*, 385 F.3d 625, 629 (6th Cir. 2004) (holding that an "[u]nlawful seizure occurs when an officer, without reasonable suspicion, 'by means of physical force or show of authority . . . in some way restrain[s] the liberty of a citizen.' *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). One's liberty is restrained when a reasonable person would not feel free to walk away and ignore the officer's request"). The plaintiff did not allege any of these components in her complaint, nor is it likely that she could since Becerra was unconscious at the time of his encounter with the defendants and could not perceive any restraint on his liberty or otherwise feel compelled to submit to a governmental show of force. Finally, where the purpose is to render solicited aid in an emergency rather than to enforce the law, punish, deter, or incarcerate, there is no federal case authority creating a constitutional liability for the negligence, deliberate indifference, and incompetence alleged in the [*8] instant case. The Eighth Amendment "Cruel and Unusual Punishment" Clause raising a "deliberate indifference" standard does

not apply here because Becerra was not incarcerated and the purpose of the alleged wrong was not punishment.

Plaintiff cites a recent Second Circuit case where a non-verbal individual who could communicate by blinking his eyes and using a computer was brought to the hospital by emergency medical workers even though he communicated that he did not want to receive any further treatment. *Green v. City of New York*, 465 F.3d 65 (2d Cir. 2006). In the course of transporting the wheelchair-bound plaintiff, who suffered from Lou Gehrig's disease, to the hospital, the paramedics allegedly inflicted numerous bruises and lacerations on the victim by callously transporting him down several flights of stairs in his apartment building. The Second Circuit held that this conduct constituted a clearly established "seizure" of the person under the Fourth Amendment, *i.e.*: for a government official knowingly to transport a competent adult for medical treatment over his announced objection unless the person was a danger to himself or others. Thus, the [*9] Court denied the motion for qualified immunity and remanded the case for trial on whether or not the force used to seize and transport the plaintiff was unreasonable. Unlike the instant case, the individual in the *Green* case was conscious and competent and objected to being taken into custody.

The conclusion reached by the Second Circuit is consistent with the case law from this Circuit. In *Champion v. Outlook Nashville*, this Court held that the Fourth Amendment rights of Champion, a non-verbal, autistic adult, were violated and the defendant police officers were not entitled to qualified immunity

where the officers restrained the man in a manner similar to the restraint techniques used by paramedics in this case. 380 F.3d 893 (6th Cir. 2004). The officers were summoned to a shopping center parking lot by the man's caregiver after he became agitated and violent with her. The first police officer on the scene used pepper spray to subdue the man when he would not respond to her commands that he stop approaching her. When a second officer arrived, the two officers attempted to arrest Champion and take him into custody in a nearby store.

A struggle ensued and Champion [*10] was eventually tackled and handcuffed after a third officer arrived on the scene. The three officers also bound Champion's ankles with a "hobble device" to prevent him from kicking them. During and after the handcuffing and "hobbling," Champion was on the ground in a prone position and the officers applied their body weight to his back to control his movements. After several minutes, Champion began to vomit. He died shortly thereafter. The Court held that Champion's arrest and restraint by police constituted a clearly established unreasonable seizure under the Fourth Amendment and denied the police officers' argument that they were entitled to qualified immunity. *Id.* at 901-902.

The Champion case does not support the plaintiff's argument that paramedics violated Becerra's Fourth Amendment rights. The paramedics did not unreasonably seize him for the purpose of interfering with his liberty. They responded to Becerra's grandmother's call that he was experiencing an epileptic seizure and needed medical attention. They were not acting to enforce the law, deter or incarcerate.

They are unlike the police officers in *Champion* who handcuffed and shackled the plaintiff [*11] in order to arrest and incapacitate him. The cases are not the same because the paramedics acted in order provide medical aid to Becerra. They were attempting to help him, although they badly botched the job according to the complaint.

Since Becerra was neither communicative, nor conscious and the paramedics were attempting to render aid, neither *Green* nor *Champion* applies. The plaintiff does not allege that either Becerra or his grandmother asked the paramedics to refrain from treating him. The plaintiff's excessive force claim thus looks like a medical malpractice claim rather than a Fourth Amendment or Due Process violation. Assuming arguendo that the restraint techniques used by the EMT's were excessive or medically unreasonable, the plaintiff may be entitled to recovery under the state law of negligence, but improper medical treatment by a government employee, standing alone, does not violate the Fourth or Fourteenth Amendment. As the Supreme Court observed in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 202, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989):

> It may well be that, by voluntarily undertaking to protect Joshua against a danger it [*12] concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger. See Restatement (Second) of Torts § 323 (1965) (one who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion); see generally

> W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts § 56 (5th ed. 1984) (discussing "special relationships" which give rise to affirmative duties to act under the common law of tort). But the claim here is based on the Due Process clause of the fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation. See *Daniels v. Williams*, 474 U.S. at 335-336; *Parratt v. Taylor*, 451 U.S. at 544; *Martinez v. California*, 444 U.S. 277, 285, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980): *Baker v. McCollan*, 443 U.S. 137, 146, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979); *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). A State may, through its courts and [*13] legislatures, impose such affirmative duties of care and protection upon its agents as it wishes.

The plaintiff also alleges that the defendants unconstitutionally failed to render medical treatment to Becerra. The complaint argues that this failure violated the Fourth Amendment protection against unreasonable seizure and the Fourteenth Amendment guarantee of substantive due process. J.A. 13-14.

Generally, "it is not a constitutional violation for a state actor to render incompetent medical advice or fail to rescue those in need." *Jackson v. Schultz*, 429 F.3d 586, 590 (6th Cir. 2005) (citing *DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)). There are two exceptions to this rule, instances where the state is obligated to aid or protect an individual from further

danger: 1) the custody exception and 2) the state created danger exception. *Jackson*, 429 F.3d at 590-91.

The custody exception imposes on state officials a "constitutional duty to provide adequate medical care to incarcerated prisoners . . . and those under similar restraint of personal liberty." *Id.* The court in [*14] *Jackson* held that a constitutional duty was not triggered where paramedics placed an individual wounded by a gunshot into their ambulance and began transporting him to the hospital. The District Court had held that moving an unconscious patient into the ambulance constituted custody, but we held that "the concept of custody does not extend this far." *Id.* The facts in the present case similarly fail to allege that Becerra was taken into custody. He was restrained while he was unconscious, and the defendants' actions were undertaken in an effort to render medical treatment. This is easily distinguished from the archetypical custody exception case where jail or prison officials fail to provide medical treatment to an incarcerated individual.

The state-created danger exception applies where the state causes or greatly increases the risk of harm to its citizens without due process of law through its own affirmative acts. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998). To establish liability under this theory, a plaintiff must show: (1) affirmative acts by the state that "create or increase the risk that an individual will be exposed to private [*15] acts of violence;" (2) that the state's actions placed the victim "specifically at risk, as distinguished from a risk that affects the public at large;" and (3) that the state knew or "clearly should have known that its actions

specifically endangered an individual." *Id.* This exception does not apply here because the defendant's actions did not expose Becerra to private acts of violence as required by the first prong. We see no basis at all in this case on which plaintiff can recover for a federal constitutional tort, and accordingly we reverse the judgment below and remand with instructions to grant qualified immunity to the individual defendants and for other relief not inconsistent with this opinion.

Footnote

*The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

NO. 3:05-0552
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEPHANIE PEETE, as next of kin, and as personal representative of the estate of FEDERICO BECERRA, JR., deceased.,
Plaintiff,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,
Defendants.

ORDER

JUDGE HAYNES

Plaintiff, Stephanie Peete, the personal representative of Federico Becerra, Jr., deceased, filed this action under 42 U.S.C. § 1983 against the Defendants: Metropolitan Government of Nashville and Davidson County ("Metro"), five (5) Metro firefighters, paramedics, and emergency medical technicians. Plaintiffs claims arises out of Becerra's death that is allegedly due to the individual Defendants' acts and omissions in reacting to the deceased's seizure due to his epilepsy.

Before the Court is the Defendants" motion to dismiss (Docket Entry No. 33), challenging the legal sufficiency of Plaintiffs complaint, asserting qualified immunity and contending insufficient allegations for any claim against Metro.

Upon consideration of any motion to dismiss a District Court is to "treat all of the well-pleaded allegations of the complaint as true." Miree v. De Kalb County, Ga., 433 U.S. 25, 27 n.2 (1977). In addition, "the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 416 U.S. 232,236 (1974). Moreover, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson 355 U.S. 41, 45-46 (1957). There is particular scrutiny of motions to dismiss civil rights actions. Brooks v. Seiter 779 F.2d 1177,1180 (6th Cir. 1985).

As to Plaintiffs Section 1983 claims against Metro, there are not any specialized pleading requirements. Weatherman v. Tarrant County, 507 U.S. 163 (1993). The Court concludes that Plaintiff has given notice of her claims against Metro.

As a general rule, qualified immunity is a question of law. Saucier v. Katz, 533 U.S. 194, 201 (2001); Poe v. Haydeg, 853 F.1d 418, 424 (6th Cir. 1988). The Court, however, possesses discretion to determine if a material factual dispute is associated with the immunity issue so as to deny a qualified immunity contention. Jackson v. Hoylman, 933 F.2d 401 (6th Cir. 1991); Dominque v. Telb. 831 F.2d 673, 676 (6th Cir. 1987).

The Court concludes that the rights here are clearly established. Here, Plaintiff alleges that during the deceased's epileptic episode, the individual Defendants used excessive force with their bodies to preclude him from moving when he needed medical attention, Freedom from excessive use of force is a Fourth Amendment right that was clearly established at the time of the individual Defendants' alleged conduct. Graham v. Connor, 490 U.S. 386,396-97 (1989).

The use of the alleged force in this factual context has been held to be excessive force and sufficient to deny qualified immunity. Champion v. Outlook Nashville, Inc.,380 F.3d 893, 903 (6th Cir. 2004) (denying qualified immunity for similar acts in 2000). Whether the actual facts show a violation of those rights requires discovery.

Accordingly, the Defendants' motion to dismiss (Docket Entry No. 33) is DENIED, without prejudice to renew upon a motion for summary judgment after completion of discovery. It is so ORDERED.

ENTERED this 6th day of February, 2006.

Filed 11/23/2007
No. 06-5321
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHANIE PEETE,
Plaintiff-Appellee,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; NASHVILLE TENNESSEE FIRE DEPARTMENT, Defendants, MICHAEL TURNER, Firefighter Captain; MALCOLM ARRINGTON, Firefighter; WILLIAM KEVIN WEST, Paramedic; DAVID KINGSBURY, Paramedic; LLOYD CRAWFORD, EMT, Defendants-Appellants.

Before: MERRITT and GRIFFIN, Circuit Judges; LAWSON, District Judge*

ORDER DENYING PETITION FOR REHEARING EN BANC

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition has been referred to the original panel.

Stephanie Peete has petitioned the court for a rehearing of the panel decision in this case that was entered on May 22, 2007, and suggested that a

rehearing en banc warranted. She argues that the decision conflicts with Supreme Court and Sixth Circuit precedent and misconstrues the facts alleged in her complaint. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. For the reasons that follow, the petition is denied.

Peete's lawsuit alleges that firefighters and paramedics responding to a 911 call on behalf of her next-of-kin, Frederico Bercerra, Jr., responded to his seizure by placing him in a prone position and applying force to his torso and that these actions caused Bercerra to asphyxiate and die. Peete claims that these actions violate Bercerra's rights under the Fourth, Eighth, and Fourteenth Amendments. We reversed the district court's decision to deny qualified immunity to the individual defendants in the case, instructing the court to dismiss Peete's claims against them.

Peete first argues that the panel decision conflicts with long-standing Supreme Court precedent by creating a new exception to the Fourth Amendment that affords absolute immunity to firefighters and emergency personnel responding to a 911 call. This argument is untenable. In the opinion, we cited several cases in which the Fourth Amendment has been applied to government officials besides police officers and explained that the amendment's application in this case "must turn on the specific purpose and particular nature of the conduct alleged in the complaint." The analysis that followed showed that a Fourth Amendment challenge like this one could proceed if Peete alleged that Bercerra had been seized as the Fourth Amendment plainly requires. We are at a loss to understand how the application of this

straightforward Fourth Amendment requirement provides emergency medical personnel and firefighters anything resembling absolute immunity.

Peete also argues that our seizure analysis improperly relied on a reading of the paramedics' subjective intent, instead of applying the traditional objective Fourth Amendment test. To the contrary, we explained that to support this type of Fourth Amendment action, Peete must allege that the paramedics "seized" Bercerra. In this objective analysis, we explicitly agreed with the Second Circuit's decision in Green v. City of New York, 465 F.3d 65 (2d Cir. 2006), that a seizure occurs where emergency medical personnel restrain or transport an individual against the person's expressed consent. [2] Peete's complaint failed because we were unable to find any allegation of an expressed lack of consent by Bercerra (or his grandmother who was present).

Finally, Peete argues that the decision relied on a determination that Bercerra was unconscious throughout this episode and that determination is at odds with the facts pled in her complaint. We first note that the decision in this case in no way turns on a precise medical determination of Bercerra's consciousness while he was experiencing the seizure. The operative fact, as explained above, is that there is no indication that Bercerra expressed a lack of consent to the paramedics' actions. Further, setting aside the medical issue of consciousness, the facts alleged in the complaint indicate that Bercerra was, at a minimum, unable to communicate or control his bodily motions while he was receiving treatment from the paramedics:

> 7. The decedent [Bercerra] had fallen next to the home's refrigerator during his seizure and Ms.

> Tunstill [Bercerra's grandmother] was unable to lift her grandson to his feet.
>
> ...
>
> 9. The defendant Firefighters/Paramedics/EMTs dragged the decedent from the kitchen area to the living room and immediately placed him in a prone position.

If Bercerra's grandmother was trying to lift him to his feet and the paramedics were eventually required to move him, he must have lacked the ability to control his bodily movements sufficiently to stand on his own. The complaint further states:

> 8. Defendant Firefighters/Paramedics/EMTs responded to the call and were informed by Ms. Tunstill that the decedent had epilepsy and was having a seizure.

This alleged fact combined with the lack of any reference to communications between Bercerra and the paramedics indicate that he was unable to communicate with them. More to the point, there is no indication that Bercerra (or his grandmother) ever expressed a lack of consent to the paramedics' actions.

In this petition, Peete claims that she can provide testimony that Becerra was in fact alert during this period and expressed a desire for the paramedics to release their grip on him. Because, this action is before us as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we are limited to considering the facts alleged in the complaint. As we explained in our original decision in this case, and further clarify here' the facts alleged in Peete's complaint are not sufficient to support a claim under the Fourth Amendment and

are therefore subject to dismissal.

Accordingly, the petition is denied.

Footnote

*The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

2 In the instant motion, Peete argues that our decision conflicts with the second Circuit's opinion in *Green*. After re-reading both decisions, we fail to see any conflict. The *Green* decision makes clear that the decedent (and his family members) in that case clearly and repeatedly communicated to the emergency medical personnel that he did not want to be transported to the hospital.

NO. 3:05-0552
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEPHANIE PEETE, as next of kin, and as personal representative of the estate of FEDERICO BECERRA, JR., deceased.,
Plaintiff,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,
Defendants.

COMPLAINT

JURISDICTION

1. The jurisdiction of the court is invoked pursuant to the Civil Rights Act, 42

U.S.C. sections 1983 et seq., 1985,1986 and 1988; the Judicial Code, 28 U.S.C. sections 1331, and 1343(a); the Constitution of the United States; and supplemental jurisdiction pursuant to 28 U.S.C. section 1367.

PARTIES

Plaintiffs

2. Plaintiff Federico Becerra Jr., deceased, resided at 809 Cheyenne Blvd, Madison, Tennessee on July 15,

2004. It will be alleged that he died on that date as a result of the acts and/or omissions of the defendants in this case. Decedent's sister, Stephanie Peete, is prosecuting this matter as next of kin, and as decedents's personal representative. Defendants

3. Defendant Metropolitan Government of Nashville and Davidson County was an administrative subdivision of the State of Tennessee which employed the individual defendant firefighters, paramedics and emergency medical technicians ("EMTs") in this case on July 15, 2004, and was at all relevant times responsible for the training, policies, practices, operations and customs of the Metropolitan Government of Nashville and Davidson County and its personnel.

4. Alternatively, Defendant Nashville Fire Department was, at all relevant times, the employer and principal of the defendant firefighters, paramedics and EMTs that responded to Plaintiff's residence on July 15, 2004, and, as such, is and was at all relevant times responsible for the training, policies, practices, operations and customs of the Nashville Fire Department and its personnel.

5. Defendants Firefighters and/or Paramedics and/or an EMTs, William Kevin West license number 3020195 ("West"), Lloyd Crawford license number 1014824 ("Crawford") David Kingsbury license number 3014752 ("Kingsbury"), and Engine 31 Firefighter Captain Michael Turner and Engine 31 Firefighter Malcolm Arrington, were at the time of the occurrence, duly appointed Firefighters/Paramedics/EMTs. At all relevant times, they each were engaged in the conduct complained of in the course and scope of their employment with the Metropolitan Government of

Nashville and Davidson County and/or Nashville Fire Department, under color of law, and while they were on duty. They are each being sued in their individual capacities. (For simplicity these individual defendants will be collectedly referred to as the defendant "Firefighters/Paramedics/EMTs")

## FACTS COMMON TO ALL COUNTS

6. On July 15, 2004, at approximately 9:00 p.m., plaintiff decedent's grandmother, Alma Tunstill, telephoned "911" requesting help for her grandson who was having a seizure due to his epilepsy.

7.The decedent had fallen next to the home's refrigerator during his seizure and Ms. Tunstill was unable to lift her grandson to his feet.

8. Defendant Firefighters/Paramedics/EMTs responded to the call and were informed by Ms. Tunstill that the decedent had epilepsy and was having a seizure.

9.The defendant Firefighters/Paramedics/EMTs dragged the decedent from the kitchen area to the living room and immediately placed him in a prone position.

10. The defendant Firefighters/Paramedics/EMTs then began to restrain the decedent by using their bodies to apply weight and pressure to the decedent's head, neck, shoulders, arms, torso and legs in an attempt to prevent the decedent from moving.

11. The defendant Firefighters/Paramedics/EMTs tied the decedent's hands and ankles behind his back.

12. At no time prior to restraining decedent Becerra Jr. did he pose a threat to himself or the defendants.

13.The defendant Firefighters/Paramedics/EMTs continued to apply pressure to the decedent while he was in a prone position when they knew or should have known that their actions created a strong likelihood of death or great bodily harm.

14.The defendant Firefighters/Paramedics/EMTs failed to assess the decedent to determine whether he was in need of medical treatment when they knew or should have known that their actions created a strong likelihood of death or great bodily harm.

15. The individual defendants took no action to ensure the decedent Becerra Jr. was breathing during the time they restrained him, that he had a clear air passage to breathe, or to monitor his condition.

16.Plaintiff decedent died shortly after being restrained by the defendant Firefighters/Paramedics/EMTs.

17. Plaintiff decedent had not committed any crime before or after the defendants arrived at his home, nor did the defendant have probable cause or reasonable grounds to believe that the plaintiff decedent had committed a crime.

18.At no time after the defendant Firefighters/ Paramedics/EMTs placed their hands upon plaintiff decedent was he free to move about the house, free to leave the living room, free to seek medical attention elsewhere or free to leave the grasp of the defendants.

19. Federico Becerra Jr. the "decedent"} suffered and died as a direct result of (1) the. pressure applied to his head, back, shoulders, neck and torso while he was placed on his stomach with his hands and legs tied behind his back; (2) the manner in which he was restrained; (3) the failure to monitor and alleviate his being denied the ability to breathe while he was being restrained; (4) the failure to provide him with the proper and appropriate emergency medical care at the scene; (5) the failure, by the defendants, to provide proper medical treatment to him prior to his body arriving at the hospital; (6) the failure to have diagnosis and treat decedent's behavior as an epileptic seizure; (7) failure to follow their procedures and protocols for caring for a person suffering from a epileptic seizure, and (8) each defendants failure to prevent these acts by the other defendants.

20. From the time the defendants first encountered Federico Becerra Jr. until his death, he suffered extreme physical and emotional trauma, pain, injury, suffering, and humiliation as a direct and proximate result of the acts and/or omissions of the defendants.

21. All of the defendants acted maliciously, wilfully, wantonly, in reckless disregard for, and/or deliberate indifference to Federico Becerra Jr.'s safety, life, medical needs and constitutional rights.

COUNT I

[§1983 Unreasonable and Excessive Force Claim - Individual Defendants]

22. Plaintiffs reallege paragraphs I through 21 as his paragraph 22.

23.The acts of the defendant Firefighters/ Paramedics/ EMTs in a) restraining Federico Becerra Jr. in prone position; b) restraining him in a manner that prevented him from breathing freely, c) failing to protect him from said restraint while having the opportunity and duty to do so; and by, d) failing to provide medical assistance to decedent, was an excessive use of force, constituted an unreasonable seizure and deprived him of his right to be fine from an unlawful seizure and his right to life as guaranteed by 42 U.S.C. sec. 1983, the Fourth and Fourteenth Amendments to the United States Constitution.

24.These acts and/or omissions by the defendants proximately caused plaintiff's decedent, Federico Becerra Jr., to suffer the above enumerated physical and psychological injuries, pain, humiliation, and suffering, from the time the defendants restrained him until his death.

25. The acts and/or omissions of the defendants also proximately caused the death of Federico Becerra Jr.

WHEREFORE, the plaintiff, STEPHANIE PEETE, as next of kin, and as personal representative of the estate of FEDERICO BECERRA JR., deceased, demands substantial compensatory damages against the individual defendant Firefighters/ Paramedics/ EMTs, jointly and severally for the decedent's physical and emotional trauma, pain, injury, suffering, humiliation, and death, and additionally, because the defendants acted maliciously, wilfully, wantonly, with deliberate indifference, and/or in reckless disregard for the decedent's constitutional rights, plaintiff demands substantial punitive damages from these defendants, as

well as costs, attorneys fees, and whatever additional relief this Court deems equitable and just.

COUNT II
[§ 1983 Failure to Provide Medical Attention - Individual Defendants]

26. Plaintiff realleges paragraphs I through 25 as his paragraph 26.

27.The defendant Firefighters/Paramedics/EMTs a) failed to take any action to provide decedent with proper and/or appropriate emergency medical care for his epilepsy and seizure disorder, b) failed to take the appropriate action to treat, relieve, or revive decedent or to provide him with proper and/or appropriate emergency medical care after placing him in a prone position with his hands and feet tied and restrained and applying pressure to his head, back, , shoulders, torso and legs, and c) failed to treat or seek treatment immediately upon determining that decedent was not breathing and had no pulse, and knowing these actions and/or omissions created a strong likelihood of death or great bodily harm constituted a failure to fulfill their duty to provide medical attention. This failure to provide proper and/or appropriate medical attention, assistance and care included but were not limited to, restraining him, restraining him in a prone position for a prolong period of time, compromising his airway, not sitting him up or turning him on his side, not removing his hand and leg restraints, not clearing his airway, not providing cardiovascular resuscitation, failing to follow proper and established protocols under the circumstances, and/or not providing for, or seeking, proper and/or appropriate emergency assistance to do

any of the above. Above defendants' acts and/or omissions caused the decedent to be incapable of being revived when transported to the Tennessee Christian Medical Center and caused her pain, suffering and, ultimately, his death. Such failure to fulfill their duty to provide medical attention deprived him of his right to be free from an unlawful seizure, excessive force, and his right to life as guaranteed by 42 U.S.C. sec. 1983, the Fourth and Fourteenth Amendments to the United States Constitution.

28. These acts and/or omissions by the individual defendants, individually and collectively, was a proximate cause of the plaintiff decedent to suffer the above enumerated physical and psychological injuries, pain, humiliation, and suffering, from the time the defendants restrained him until his death.

29. The acts and/or omissions by the individual defendants, individually and collectively, was also a proximate cause of Federico Becerra Jr.'s death.

WHEREFORE, the plaintiff, STEPHANIE PEETE, as next of kin, and as personal representative of the estate of FEDERICO BECERRA JR., deceased, demands substantial compensatory damages against the individual defendant Firefighters/ Paramedics/ EMTs, jointly and severally for the decedent's physical and emotional trauma, pain, injury, suffering, humiliation, and death, and additionally, because the defendants acted maliciously, wilfully, wantonly, with deliberate indifference, and/or in reckless disregard for the decedent's constitutional rights, plaintiff demands substantial punitive damages from these defendants, as well as costs, attorneys fees, and whatever additional

relief this Court deems equitable and just.

Count III [Conspiracy]

30. Plaintiffs reallege paragraphs I through 29 as his paragraph 30.

31.The defendant Firefighters/Paramedics/EMTs acting together and under color of law, reached an understanding and agreement, engaged in a course of conduct, and otherwise conspired among and between themselves and with other unnamed co-conspirators, to deprive the plaintiff decedent and his surviving heirs of their constitutional rights, and did deprive them of said rights, including plaintiff decedent's right to be free from unreasonable seizures, his right to life and his right to medical care, and his parent's right to his companionship, financial support, and a loving relationship with him, as protected by the Fourth and Fourteenth amendments to the U.S. Constitution, 42 U.S.C. § 1983, and 42 U.S.C. § 1985 et. seq.

32. In furtherance of this conspiracy or conspiracies, the defendants committed the overt acts set forth in the facts above, including, but not limited to, unreasonably binding and retraining the decedent, a person known to them to be having a medical emergency, failing to prevent said binding and restraining; binding decedent's hand behind his back face down, binding his feet, and applying pressure on his head, neck, shoulders, back and torso before and while his hands and feet were bound, failing to monitor or remove decedent from the deadly circumstances in which they placed him; failing to provide or seek emergency medical assistance for him; and then fabricating a false

and exculpatory version of the events.

33.Said conspiracy or conspiracies and overt acts caused said constitutional violations and said injuries, pain, suffering, mental anguish, humiliation, and death, as set forth above.

WHEREFORE, the plaintiff, STEPHANIE PEETE, as next of kin, and as personal representative of the estate of FEDERICO BECERRA JR., deceased, demands substantial compensatory damages against the individual defendant Firefighters/ Paramedics/ EMTs, jointly and severally, for the decedent's physical and emotional trauma, pain, injury, suffering, humiliation, and death, and additionally, because the defendant acted maliciously, wilfully, wantonly, with deliberate indifference, and/or in reckless disregard for the decedent's constitutional rights, plaintiff demands substantial punitive damages from this defendant, as well as costs, attorneys fees, and whatever additional relief this court deems equitable and just.

Count IV

[1§ 1983 and § 1986 Failure to Protect - Individual Defendants] 34. Plaintiffs reallege paragraphs I through 33 as his paragraph 34]

35.The acts of the defendant Firefighters/ Paramedics/ EMTs in failing to protect the decedent from each other's, and the other defendant's, deadly acts which included a) restraining the decedent; b) restraining the decedent in a prone position while binding his hands and legs and while applying pressure to his shoulder, head, back, torso and legs m' this position, c)

restraining the decedent in a manner that prevented him from breathing freely, and, d) failing to protect him from said restraint of every other defendant while having the opportunity and duty to do so, these acts and their failure to protect the decedent from these acts created a substantial risk of death or great bodily harm deprived the decedent of his right to be free from an illegal seizure and his right to life in violation of the Fourth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and 42 U.S.C. § 1986.

36. Said acts and/or omissions of these defendants proximately caused pain and suffering to the deceased Federico Becerra Jr., and also caused his death.

WHEREFORE, the plaintiff, STEPHANIE PEETE, as next of kin, and as personal representative of the estate of FEDERICO BECERRA JR., deceased, demands substantial compensatory damages against the individual defendant Firefighters/ Paramedics/ EMTs, jointly and severally for the decedent's physical and emotional trauma, pain, injury, suffering, humiliation, and death, and additionally, because the defendants acted maliciously, wilfully, wantonly, with deliberate indifference, and/or in reckless disregard for the decedent's constitutional rights, plaintiff demands substantial punitive damages from these defendants, as well as costs, attorneys fees, and whatever additional relief this Court deems equitable and just.

Count V
[Plaintff's Monell Policy Practice and Customs]

37. Plaintiffs reallege paragraphs I through 36 as his

paragraph 37.

38.The actions of the defendant Firefighters/ Paramedics/ EMTs as alleged above, were done pursuant to one or more de facto policies, practices and/or customs of the Metropolitan Government of Nashville and Davidson County and/or the Nashville Fire Department.

39.On and before July 15, 2004, the defendant Metropolitan Government of Nashville and Davidson County and/or the Nashville Fire Department had interrelated defacto policies, practices, and customs which included, inter alia (a) the failure to properly train, supervise, discipline, transfer, counsel and otherwise control its firefighters, paramedics and emergency medical technicians engaged in the excessive use of force and other abuses, particularly in cases where they are required to handle, restrain, protect, or provide medical treatment to agitated persons known or likely to be suffering from epilepsy or the effect thereof.

40.In particular, the defendant Firefighters/ Paramedics/ EMTs were not properly trained in how to restrain, arrest, protect, monitor or medically treat individuals in their control suffering from epilepsy, agitation, mental confusion, and/or the effects of epilepsy, to avoid subduing them without using deadly force or other life threatening techniques. This failure to train by the defendant Metropolitan Government of Nashville and Davidson County and/or the Nashville Fire Department was done with the knowledge that Nashville Firefighters/Paramedics/EMTs were certain to confront such persons and that deadly and excessive

force would likely be used without adequate training. The defendant Metropolitan Government of Nashville and Davidson County and/or the Nashville Fire Department lack of training, supervision, policy, procedure, custom or practice in restraining individuals with epilepsy or those having an epileptic seizure or those with diminished mental capacity or diminished cognitive reasoning or diminished mental awareness created a de facto policy of treating individuals having epileptic seizures or those with diminished mental capacity or diminished cognitive reasoning or diminished mental awareness the same as those individuals suspected of a crime, on narcotics or intoxicated. The de facto policy constituted a widespread practice and was so well settled to establish a custom or usage with the force of law.

41.As a direct and proximate cause of these policies, Federico Becerra Jr.'s constitutional protected rights under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment, as applied by 42 U.S.C. section 1983, were violated and these defendants are liable to the decedent and his estate for his injuries, pain, suffering, mental anguish, humiliation, and his death.

WHEREFORE, the plaintiff, STEPHANIE PEETE, as next of kin, and as personal representative of the estate of FEDERICO BECERRA JR., deceased, demands and seeks substantial compensatory damages against the defendant Metropolitan Government of Nashville and Davidson County and/or the Nashville Fire Department, as well as costs, attorneys fees, and whatever additional relief this Court deems equitable and just.

Count VI
[Failure to Adequately Train the Individual Defendants]

42. Plaintiffs reallege paragraphs I through 36 as his paragraph 42.

43.Defendants Metropolitan Government of Nashville and Davidson County and/or the Nashville Fire Department had the duty and responsibility to adequately train its Firefighters/Paramedics/EMTs, including the individual defendants named in this action.

44.On and before July 15, 2004, the defendant Metropolitan Government of Nashville and Davidson County and/or the Nashville Fire Department failed to: a) adequately and/or properly train its Firefighters/Paramedics/EMTs with respect to the constitutional limitations placed upon the use of force, including but not limited to deadly force; b) failed t6 adequately and/or properly train its Firefighters/Paramedics/EMTs with respect the safe and proper way to restrain an individual without causing them great bodily harm and death; c) adequately and/or properly train its Firefighters/Paramedics/EMTs with respect assessing a scene prior to restraining an individual that may be suffering from a medical condition; d) adequately and/or properly train its Firefighters/Paramedics/EMTs with respect a situation where an individual is unable to respond to, or follow, their verbal commands; e) adequately and/or properly train its Firefighters/Paramedics/EMTs with respect to the

safety. of multiple individuals applying pressure to the neck, shoulders, back and legs of an individual in a prone position whose hands are bound behind his back and feet are bound; f) adequately and/or properly train its Firefighters/Paramedics/EMTs with respect the necessity to intercede when multiple individuals are applying pressure to the neck, shoulders, back and legs of an individual in a prone position whose hands are bound behind his back and feet are bound; g) adequately and/or properly train its Firefighters/Paramedics/EMTs with respect to providing medical treatment to a person that is, or has, suffered a seizure due to epilepsy; and h) adequately and/or properly train its Firefighters/ Paramedics/ EMTs with respect to providing emergency medical attention to an individual in their custody.

45. Defendants Metropolitan Government of Nashville and Davidson County and/or the Nashville Fire Department's policy makers were deliberately indifferent to the training policy it employed and its deficiencies.

46.As a direct and proximate cause of these training policies and deficiencies, the decedent's constitutional protected rights under the Due Process Clause of the Fourteenth Amendment, as applied by 42 U.S.C. section 1983, were violated and these defendants are liable to the decedent and his estate for his injuries, pain, suffering, mental anguish, humiliation, and his death.

WHEREFORE, the plaintiff, STEPHANIE PEETE, as next of kin, and as personal representative of the estate of FEDERICO BECERRA JR., deceased,

demands substantial compensatory damages against Defendants Metropolitan Government of Nashville and Davidson County and/or the Nashville Fire Department for the decedent's physical and emotional trauma, pain, injury, suffering, humiliation, and death, as well as costs, attorneys fees, and whatever additional relief this Court deems equitable and just.

Count VII [Wrongful Death Claim]

47. Plaintiffs reallege paragraphs I through 46 as his paragraph 47.

48. Decedent Federico Becerra Jr. was officially pronounced dead on July 15, 2004.

49. The wrongful death of plaintiff decedent was proximately caused by the reckless, willful and wanton and malicious conduct of the individual defendants and/or the policies and/or lack of policies of the defendants Metropolitan Government of Nashville and Davidson County and/or the Nashville Fire Department.

50. The next of kin have lost and will continue to lose society and companionship and have incurred funeral and burial experiences as a proximate result of the wrongful death of plaintiff decedent pursuant to T.C.A 20-5-106 et. seq. and T.C.A 20-5-113 et. seq.

51. The decedent has lost and will continue to lose the pecuniary value of his life as a result of his death pursuant to T.C.A 20-5-113 et. seq.

WHEREFORE, the plaintiff, STEPHANIE

PEETE, as next of kin, and as personal representative of the estate of FEDERICO BECERRA JR., deceased, demands substantial compensatory damages, jointly and severally, against all the defendants named in this action, and such other relief as this Court deems just and equitable.

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No. 07-1104

FILED
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IN THE

# Supreme Court of the United States

STEPHANIE PEETE,

*Petitioner,*

*v.*

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Has Petitioner presented compelling reasons to grant the Petition for a Writ of Certiorari where the Sixth Circuit Court of Appeals, on initial review and on rehearing, and applying settled Fourth Amendment authority, held that Plaintiff failed to plead facts sufficient to bring this lawsuit within the confines of the Fourth Amendment?

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## STATEMENT OF THE CASE

On December 16, 2005, all Defendants filed a motion to dismiss all of the federal claims in Plaintiff's complaint. (Mot. to Dismiss, Resp. App. at 1a.) The district court denied Defendants' motion to dismiss in its entirety. (Order, Pet. App. at 15a.) The individual Defendants (the Respondents to this Petition) filed an immediate appeal of the denial of qualified immunity. (Op'n, Pet. App. at 4a.)

The Sixth Circuit Court of Appeals reversed the order of the district court and remanded with instructions to grant qualified immunity to the individual Defendants. *Peete v. Metro. Gov't*, 486 F.3d 217, 219, 223 (6th Cir. 2007). Plaintiff filed a petition for rehearing and rehearing en banc. (Order Denying Pet. for Rehearing, Pet. App. at 18a.) Upon consideration by the original panel, the Sixth Circuit again held that Plaintiff had not stated a Fourth Amendment claim and, thus, denied Plaintiff's petition. (*Id.*, Pet. App. at 21a-22a.) Plaintiff then filed this petition for a writ of certiorari.

## STATEMENT OF FACTS

The facts as alleged in the complaint are as follows. On July 15, 2004, at approximately 9:00 p.m., Mr. Federico Becerra's grandmother called 911 requesting medical attention for Mr. Becerra, who Plaintiff/Petitioner alleges was having a seizure due to his epilepsy. (Compl. ¶ 6, Pet. App. at 25a.) Defendants/Respondents, who are firefighters, paramedics, and emergency medical technicians ("EMTs") for the Metropolitan Government of Nashville and Davidson

County, Tennessee ("Metropolitan Government"), responded to the call. (*Id.* ¶ 8, Pet. App. at 25a.)

Petitioner alleges that Respondents placed Mr. Becerra in a prone position; used their bodies to apply weight and pressure to Mr. Becerra's head, neck, shoulders, arms, torso, and legs "in an attempt to prevent [Mr. Becerra] from moving"; and tied his hands and ankles behind his back. (*Id.* ¶¶ 9-11, Pet. App. at 25a.) Petitioner further contends that Respondents failed to ensure that Mr. Becerra was breathing while Respondents restrained him, failed to ensure that he had a clear passage to breathe, and failed to monitor his condition. (*Id.* ¶¶ 14-15, Pet. App. at 26a.) Petitioner alleges that Mr. Becerra died as a result of Respondents' actions and/or inactions. (*Id.* ¶ 19, Pet. App. at 27a.)

## SUMMARY OF ARGUMENT

Petitioner has not identified any "compelling reasons" why the Court should grant her petition for a writ of certiorari. Petitioner does not rely on any conflict among circuits and has not demonstrated that the opinion of the Sixth Circuit Court of Appeals conflicts with any opinions of this Court. Rather, Petitioner merely disputes the Sixth Circuit's application of well-established law in this case, which does not constitute a compelling reason for granting her petition. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

As the Sixth Circuit properly held, Petitioner has not stated a viable Fourth Amendment claim. At most,

Petitioner alleged that Respondents, acting in the course and scope of their employment as emergency medical providers, did not provide proper or sufficient medical attention to Mr. Becerra. In the absence of any case law providing Fourth Amendment liability under similar circumstances, and particularly in the absence of any allegations of a conscious, expressed lack of consent, Petitioner's "medical malpractice" allegations do not constitute a Fourth Amendment claim.

## REASONS FOR DENYING THE PETITION

### I. APPLYING WELL-ESTABLISHED LAW, THE SIXTH CIRCUIT PROPERLY REJECTED PETITIONER'S STRAINED ARGUMENT THAT THE FOURTH AMENDMENT APPLIES TO THIS CASE

The Sixth Circuit, applying well-established authority, properly held that Petitioner's complaint failed to state a Fourth Amendment claim. No federal court has held that the Fourth Amendment applies where emergency medical personnel, providing solicited medical care to a patient, restrain the patient during the course of the treatment. Accordingly, Petitioner has failed to identify any compelling reason why this Court should grant her petition.[1]

The initial inquiry in a Fourth Amendment case alleging an unreasonable seizure is whether the

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[1] It should be noted that Petitioner has not petitioned this Court regarding the Sixth Circuit's grant of qualified immunity on Plaintiff's substantive due process claim against Respondents.

government actor's conduct constituted a "seizure" in the first place. *See Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007) (citing *Brower v. County of Inyo*, 489 U.S. 593, 595 (1989)). Additionally, the question of whether an individual has been "seized" within the meaning of the Fourth Amendment is an objective one. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006). To bring her complaint within the confines of the Fourth Amendment, Petitioner must affirmatively allege facts from which a court could conclude that, objectively, Mr. Becerra had been seized. Petitioner failed to do so.

This case is wholly distinguishable from the types of situations contemplated by this Court's seminal excessive force cases — *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 389 (1989). *See Graham*, 490 U.S. at 395 ("Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that ***law enforcement officers*** have used excessive force — deadly or not — in the course of an ***arrest, investigatory stop, or other 'seizure'*** of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (second and third emphasis added)). In *Graham*, this Court explain d that the Fourth Amendment "provides an explicit textual source of constitutional protection against [certain kinds of] physically intrusive governmental conduct." *Id.*

The Fourth Amendment is applied exclusively in the context of law enforcement or quasi-law enforcement type activities, such as investigation or community protection. *See, e.g.*, *Scott*, 127 S. Ct. at 1776; *Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436

U.S. 499 (1978). This is not to say that EMTs and paramedics cannot be held liable under the Fourth Amendment, and the Sixth Circuit did not hold as such in this case. However, Petitioner has neither alleged facts to bring this case within the general parameters of the Fourth Amendment nor referenced even one case in which the Fourth Amendment was applied under similar circumstances. Petitioner alleged only that Respondents, acting in the course and scope of their employment as emergency medical providers, did not provide proper or sufficient medical attention to Mr. Becerra. This is a medical malpractice case and nothing more.

In its opinion on initial hearing and on rehearing, the Sixth Circuit cited *Green v. City of New York*, 465 F.3d 65 (2d Cir. 2006), as providing a scenario in which the conduct of EMTs and paramedics could fall within the Fourth Amendment's prohibition on unreasonable force. *Peete*, 486 F.3d at 221; (Order Denying Pet. for Rehearing, Pet. App. at 20a.). In describing how it had not relied upon the paramedics' subjective intent as Petitioner suggested, the Sixth Circuit stated, "In this objective analysis we explicitly agreed with the Second Circuit's decision in *Green v. City of New York* that a seizure occurs where emergency medical personnel restrain or transport an individual against the person's expressed consent." (Order Denying Pet. for Rehearing, Pet. App. 20a (internal citations omitted).)

In *Green*, the court found that the Fourth Amendment applied where emergency personnel transported an individual, who was not a danger to himself or others, to the hospital despite his conscious and repeated instructions that he did not want to go.

*Green*, 465 F.3d at 83. As the Sixth Circuit properly recognized, the complaint in this case contains no such allegations. There are no facts alleged in the complaint to support a finding of an expressed lack of consent. To the contrary, Respondents arrived at Mr. Becerra's home solely as the result of his grandmother's request for medical care. (Compl. ¶¶ 6-8, Pet. App. at 25a.) In the absence of any allegation that Mr. Becerra, or anyone acting on his behalf, subsequently refused the medical care that they originally requested, *Green* is distinguishable, and the Fourth Amendment simply does not apply.[2]

## II. PETITIONER'S ARGUMENT THAT THE SIXTH CIRCUIT ESTABLISHED "ABSOLUTE IMMUNITY" FOR EMTs AND PARAMEDICS UNDER 42 U.S.C. § 1983 MISCONSTRUES THE SIXTH CIRCUIT'S OPINION

Petitioner's argument that the Sixth Circuit Court of Appeals, in finding that the Petitioner's complaint failed to allege a viable Fourth Amendment claim, granted "absolute immunity" to emergency medical personnel under 42 U.S.C. § 1983 is unsupported by the

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[2] The Court should likewise reject Petitioner's argument that the Sixth Circuit unreasonably found facts in this case, specifically regarding Mr. Becerra's ability to act on his own behalf. As the Sixth Circuit pointed out, its decision "in no way turn[ed] on a precise medical determination of [Mr. Becerra's] consciousness." (Order Denying Pet. for Rehearing, Pet. App. at 20a.) Instead, Petitioner failed to allege an expressed lack of consent. In light of this omission, when coupled with solicited medical care, "consent" is the only reasonable inference to be drawn from the complaint.

course of proceedings in this case. Respondents were granted qualified immunity in this case because Petitioner failed to allege facts sufficient to bring this case within the purview of the Fourth Amendment. In the absence of such facts, as here, the Fourth Amendment claim was properly dismissed.

The Sixth Circuit did not hold — and Respondents have never argued — that Section 1983 does not apply to EMTs and paramedics under any circumstances.[3] Rather, Respondents have consistently argued, and the Sixth Circuit agreed, that the conduct alleged in the Petitioner's complaint does not fall within the Fourth Amendment's prohibition against the unreasonable use of force. The disputed question before the Sixth Circuit was not whether Section 1983 applied to Respondents' conduct, but whether the Fourth Amendment did. The Sixth Circuit squarely rejected Petitioner's argument regarding "absolute immunity" in its order denying rehearing, describing the argument as "untenable." The court instead explained, "In the opinion, we cited several cases in which the Fourth Amendment has been applied to government officials besides police officers . . . . The analysis that followed showed that a Fourth Amendment challenge like this one could proceed if Peete alleged that

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[3] In fact, the Sixth Circuit's consideration of *Green v. New York* further illustrates the strained nature of Petitioner's argument. In its opinion on initial hearing and on rehearing, the Sixth Circuit cited *Green* as providing a scenario in which the conduct of EMTs/paramedics *could* fall within the Fourth Amendment's prohibition on unreasonable force. However, as described in Section I of this response, the Sixth Circuit found *Green* distinguishable from the facts alleged in the complaint in this case.

[Mr. Becerra] had been seized as the Fourth Amendment plainly requires." (Order Denying Pet. for Rehearing, Pet. App. at 20a.) This Court should likewise reject Petitioner's attempt to manufacture an issue where one does not exist.

Specifically, Petitioner states that the fact that Respondents were responding to a 911 call for medical attention "and were in the process of providing assistance to the decedent when he died . . . is *irrelevant to liability under § 1983*." (Pet. at 19 (emphasis added).) Again, this argument misses the point. Section 1983 merely serves as the vehicle through which Petitioner attempts to assert a constitutional claim and is not the claim itself. *See* 42 U.S.C. § 1983 (creating a cause of action against anyone, acting under color of state law, who subjects "any citizen of the United States or other person within the jurisdiction thereof *to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws*" (emphasis added)). The fact that Respondents were providing solicited medical attention, and were never instructed otherwise, is relevant, and fatal, to Petitioner's Fourth Amendment claim.

## CONCLUSION

Petitioner cannot argue on the one hand that Respondents were acting in the course and scope of their employment as emergency medical personnel and, on the other hand, that the Fourth Amendment applies to their *solicited* attempt to assist Mr. Becerra. Petitioner has not identified any authority wherein the Fourth Amendment was held to apply to the provision of solicited medical attention in the absence of an expressed lack of consent. For that reason, Respondents were rightly granted qualified immunity by the Sixth Circuit. Under these circumstances — in the absence of any circuit conflict, any conflicting decisions of this Court, and, in fact, no authority supporting Petitioner's position at all — Petitioner has not identified any compelling reasons for granting her petition.

Respectfully submitted,

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# APPENDIX

## APPENDIX — DEFENDANTS' MOTION TO DISMISS FILED DECEMBER 16, 2005

## IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

No. 3:05-cv-0552
Judge Haynes

STEPHANIE PEETE, as next of kin, and as personal representative of the estate of FEDERICO BECERRA JR., deceased,

Plaintiff,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, *et al.*,

Defendants.

## DEFENDANTS' MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants hereby move for dismissal of Plaintiff's Complaint in its entirety for failure to state a claim.

Plaintiff brings this cause of action on behalf of Federico Becerra, Jr. ("Mr. Becerra"), now deceased, pursuant to various federal civil rights statutes and state law. Plaintiff alleges damages arising from treatment

that various firefighters, paramedics, and emergency medical technicians (EMTs) employed by Defendant Metropolitan Government of Nashville and Davidson County allegedly provided to Mr. Becerra on July 15, 2004.

Plaintiff has failed to state a federal cause of action arising out of the facts alleged in her Complaint. First, a cause of action does not arise under the Fourth Amendment on the facts of this case, and to the extent that Plaintiff relies on that Amendment, her causes of action should be dismissed. Additionally, the exceptions to the general rule that the government has no constitutional duty to provide competent medical care to its citizens are inapplicable to this case. Thus, Plaintiff's Fourteenth Amendment claims alleging inadequate medical care and failure to protect are without merit. Alternatively, Defendants did not violate clearly established law and, thus, are entitled to qualified immunity for Plaintiff's Fourth and Fourteenth Amendment claims brought pursuant to Section 1983.

Plaintiff's conspiracy claims under 42 U.S.C. §§ 1983, 1985, and 1986 should also be dismissed. First, Plaintiff has not pleaded conspiracy with the requisite particularity. Further, a Section 1985 claim may be sustained only where the plaintiff alleges race or class-based animus, which Plaintiff has not done. Because a Section 1986 claim may be sustained only where Plaintiff has stated a viable 1985 claim, the 1986 claim is also subject to dismissal. Plaintiff's claims against the Metropolitan Government should also be dismissed

because Plaintiff has failed to allege any underlying constitutional violations. Finally, in the absence of any viable federal claims, the Court may decline to exercise supplemental jurisdiction over the remaining state law claims.

Accordingly, Defendants respectfully request that the Court dismiss Plaintiff's Complaint in its entirety. Defendants further invite the Court to refer to the attached Memorandum of Law in support of this Motion.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY
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